33

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 25

CARDOX CORPORATION,
Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER.

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INDEX.

PAGE

Table of Cases i

Statutes i

Argument 1

Conclusion 8

Appendix 1a

Cases Cited.

C-O-Two Fire Equipment Co. v. *Barnes, J.*, 194 F. (2d) 410 2

Dalton v. *Shakespeare Company*, 196 F.(2d) 469 (C.A. 5, 1952) 2

Ex Parte Collett, 337 U.S. 55, 69 S.Ct. 944 (1949) 1, 2

Neirbo v. *Bethlehem Corporation*, 308 U.S. 165, 60 S.Ct. 153 (1939) 4

Stonite Products Co. v. *Melvin Lloyd Co.*, 315 U.S. 561, 62 S.Ct. 780 (1942) 3, 4

Suttle v. *Reich Bros. Const. Co.*, 333 U.S. 163, 68 S.Ct. 587 (1948) 5

Statutes.

U. S. Code, Title 28, Section 1391(a) 7

U. S. Code, Title 28, Section 1391(b) 7

U. S. Code, Title 28, Section 1391(c) 1, 2, 4, 5, 6, 7

U. S. Code, Title 28, Section 1391(d) 7

U. S. Code, Title 28, Section 1400(b) 1, 2, 3, 4, 6, 7

U. S. Code, Title 28, Section 1404 3

U. S. Code, Title 28, Section 1694 5

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Petitioner has consistently urged that under the plain language employed by Congress the Congressional definition of corporate residence in Section 1391(c) applies to Section 1400(b) (Petitioner's Brief, pp. 8-18). This position adheres to the rule which has been invariably applied by this Court and most recently re-announced in *Ex parte Collett,* 337 U. S. 55, 69 S. Ct. 944 (1949), which is that the plain words and meaning of a statute cannot be overcome by legislative history. Nowhere in its brief has respondent asserted any ambiguity or even denied that the language of the statutes involved is clear, plain and

direct. Indeed, respondent concedes that upon a first reading the language of the two statutes Section 1391(c) is applicable to Section 1400(b) Respondent's Brief, p. 6). But, like the Court of Appeals below which found the statutory language clear and unambiguous (194 F. (2d) 410, R. 21), respondent ignores the admonition of this Court in *Ex parte Collett, supra,* and proceeds outside of the statutory language in an attempt to find that Congress did not mean what it said.

Respondent's Brief is a striking example of the strained efforts by which respondent, and the courts upon whose decisions respondent relies, (including the majority of the Court of Appeals below) have sought to make unclear the plain and unambiguous language deliberately chosen by Congress "out of the experience of the past and carefully defined for the future." As the Court of Appeals for the Fifth Circuit unanimously said in *Dalton* v. *Shakespeare Company,* 196 F. (2d) 469, 472 (1952):

> "• • • Indeed it seems to us that the difficulties arise not out of the words the statute used but out of the strained efforts to make them read otherwise than as they do."

Practically all of the arguments advanced in Respondent's Brief were fully overcome in Petitioner's Main Brief. It is only necessary here that some of the errors in respondent's position be considered.

Respondent (Brief, pp. 8-10, 25) urges that the enactment of the predecessor section to Section 1400(b), to wit, Section 109, was for the purpose of preventing oppression which would result if a corporate defendant were sued in a district other than that of its incorporation or where it had an established place of business and had committed acts of infringement. This contention ignores the fact

that since the enactment of Section 109 the mode of doing business by corporate entities has changed dramatically. Many corporations do business on a nationwide basis and have practical existence in many states other than that of incorporation. Often the state of incorporation means nothing more than the corporation having a legal existence there. For example, the affidavit of respondent's president submitted in support of its motion to dismiss in the District Court shows that the State of Delaware, wherein the respondent is incorporated, knows no more of respondent than documents indicating its existence filed in the offices of that state (R. 11-12). The activities of the respondent are conducted in states other than that of its legal existence. Congress was aware of the changed nature of corporate locations. It wisely took cognizance of the practical existence of corporations in states where they are doing business and where they are licensed to do business.

Respondent suggests no reason why a corporation sued for patent infringement should be entitled to special consideration any more than it should be in other types of legal actions. Oppression, if any exists, would be as great or as small in a patent infringement action as it would in any other tort action. Further, Section 1404, provides for transfer of civil actions for the convenience of parties and witnesses in the interest of justice.

Respondent cites (Brief p. 11) *Stonite* v. *Melvin Lloyd Co.*, 315 U. S. 561, 62 S. Ct. 780 (1942) as controlling the present situation. Respondent contends that the law was unchanged when the patent venue section there under consideraion was incorporated in the 1948 revision of the Judicial Code. Petitioner has never denied that Section 1400(b) controls venue in patent infringement actions. Petitioner does contend, however, that the change

of the word "inhabitant" to "resides" in Section 1400(b) together with similar changes in other sections of the venue chapter of the Judicial Code to make uniform the residence requirement in all venue provisions of the Code, and the insertion of a new definition of corporate residence for "venue purposes" is significant. This careful and deliberate action of Congress in drafting the venue provisions of the Code shows clearly that the definition of residence of Section 1391(c) applies wherever residence is a requirement for venue.*

Respondent does not answer petitioner's submission (Petioner's Brief, pp. 23-24) that the *Stonite* decision can not in any event control here because the two venue provisions there under consideration by this Court were mutually exclusive under the facts of that case. Respondent (Brief, p. 13), attempts to draw an anology between the *Stonite* case and the case at bar in saying that "Here, as there, the general statute is inconsistent with the special venue provision." There is no inconsistency in the instant case. Respondentd oes not undertake to show any inconsistency between Sections 1391 (c) and 1400(b).

Asserted as "settled law" by the respondent (Brief, p. 14) is that the "general rule as to corporate venue" is "now expressed in Section 1391(c)" and that general rule did not apply to patent cases (Respondent's Brief, pp. 14-15). Both propositions are erroneous.

Contrary to respondent's argument, this Court in *Neirbo* v. *Bethlehem Corporation*, 308 U. S. 165, 60 S. Ct. 153 (1939) did not decide that corporations could be sued where they did business or where licensed to do business. The *Neirbo* case merely decided that a corporation could waive its

* The venue provisions enacted by Congress in the 1948 revision of the Judicial Code are set out in an appendix at the end of this brief.

then existing privilege of being sued only in the state of incorporation, by complying with a statute of a state and as a condition of doing business within it designating an agent upon whom service of process could be made. It was not decided in that case that the doing of business constituted a waiver of venue requirements. Further, the definition of corporate residence found in Section 1391(c) was not settled law prior to the 1948 revision of the Judicial Code. This Court expressly held to the contrary.

In *Suttle* v. *Reich Brothers Co.*, 333 U. S. 163, 168, 68 S. Ct. 587 (1947), this Court said with reference to the *Neirbo* case:

> "• • • But this Court did not hold that in losing the privilege of insisting upon suit in districts specified in Sec. 51 of the Judicial Code, the defendant corporation thereby acquired 'residence' in New York, within the meaning of the venue statutes. Indeed, the Court specifically stated that the suit 'was not brought "in the district of the residence of either the plaintiff or the defendant."' ".

So, Congress when it enacted Section 1391(c) as a definition of corporate residence could not have been expressing settled law.

Respondent (Brief, pp. 18-19) asserts that Section 1694, which relates to service of process in patent suits, "is of controlling importance" and "explicitly recognizes" that "the mere conducting of business in a jurisdiction does not make the defendant a resident thereof". Respondent concludes that this section is therefore in direct conflict with Section 1391(c) insofar as corporate defendants in patent cases are concerned. The conclusion that there is a direct conflict is based on a false premise. Section 1694 does not state, as respondent implies, that conducting of business in a jurisdiction never makes the

defendant a resident thereof. Section 1694 does recognize that there may be instances in patent infringement cases in which the conducting of business in a jurisdiction does not make the defendant a resident thereof and provision is made for service of process in such instances. Examples, of course, are individuals, co-partnerships and associations. But a corporate defendant does become a resident of a district in which it is licensed to do business or is conducting business. This is clearly and unequivocally stated in Section 1391(c).

Respondent asserts (Brief, pp. 19-20) that if the plain language that Congress employed is adhered to a portion of Section 1400(b) "becomes meaningless." Respondent, in support of its argument, rewords Section 1400(b) to include Section 1391(c). This rewording, however, ignores all types of defendants other than corporations. This attempted revision is startling in view of respondent's admitted ability to understand the clear meaning of the two sections on a "first reading" (Respondent's Brief, p. 6). On page 6 of Respondent's Brief, the task is simple; on page 20, it becomes impossible.

Respondent's argument that the second portion of Section 1400(b) becomes meaningless if Section 1391(c) is utilized in defining the first portion thereof contains a basic error. Respondent argues that the only solution to the problem it manufactures is that the second clause of Section 1400(b) be construed to include "only individuals" and that would result in the term "defendant" including corporations in the first portion of Section 1400(b) and excluding corporations in the second portion (Respondent's Brief, p. 20). Respondent errs in its hypothesis. Petitioner has made and now makes no such argument. The second portion of Section 1400(b) can and does apply to all defendants, including corporations. No violence is

done to that portion of the statute because a corporation having a regular and established place of business in a district might also be a resident under the definition of Section 1391(c). How can inconsistency or confusion arise simply because the same facts satisfy both of two alternatives? (See Petitioner's Brief, pp. 19-20)

Respondent sets forth the reviser's notes under Section 1400(b) and one of the notes under Section 1391 (Brief, pp. 16-17). Significantly, however, respondent has omitted to point out that the note under Section 1391 (which is set forth in full) on its face relates only to Sections 1391(a) and (b), which provide for venue in certain types of actions without regard to the character of the defendants involved. Section 1391(a) governs the venue in diversity cases; Section 1391(b) controls the venue in non-diversity cases. On the other hand Section 1391(c)—the section here involved—relates to venue only as to a particular kind of defendant but without regard to the type of action, *i.e.* corporate defendants; and Section 1391(d) relates to alien defendants, but again regardless of the type of action. Thus, the reviser's notes on this point are of no significance.

CONCLUSION.

The Court below conceded that the language employed by Congress was clear, plain and unambiguous. Respondent concedes that it can understand the two statutes involved after but "a first reading." The efforts of the Court of Appeals below and the respondent to show that Congress did not mean what it said cannot prevail.

Respectfully submitted,

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APPENDIX.

Chapter 87 Title 28
District Courts; Venue

§ 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

§ 1392. Defendants or property in different districts in same State.

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

(b) Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.

§ 1393. Divisions; single defendant; defendants in different divisions

(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.

(b) Any such action, against defendants residing in different divisions of the same district or different districts in the same State, may be brought in any of such divisions.

§ 1394. Banking association's action against Comptroller of Currency

Any civil action by a national banking association to enjoin the Comptroller of the Currency, under the provisions of any Act of Congress relating to such associations, may be prosecuted in the judicial district where such association is located.

§ 1395. Fine, penalty or forfeiture

(a) A civil proceeding for the recovery of a pecuniary fine, penalty or forfeiture may be prosecuted in the district where it accrues or the defendant is found.

(b) A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found.

(c) A civil proceeding for the forfeiture of property seized outside any judicial district may be prosecuted in any district into which the property is brought.

(d) A proceeding in admiralty for the enforcement of fines, penalties and forfeitures against a vessel may be brought in any district in which the vessel is arrested.

(e) Any proceeding for the forfeiture of a vessel or cargo entering a port of entry closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection, or of any vessel or vehicle conveying persons or property to or from such State or section or belonging in whole or in part to a resident thereof, may be prosecuted in any district into which the property is taken and in which the proceeding is instituted.

§ 1396. Internal revenue taxes

Any civil action for the collection of internal revenue taxes may be brought in the district where the liability for such tax accrues, in the district of the taxpayer's residence, or in the district where the return is filed.

§ 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

§ 1398. Interstate Commerce Commission's orders

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

§ 1399. Partition action involving United States

Any civil action by any tenant in common or joint tenant for the partition of lands, where the United States

is one of the tenants in common or joint tenants, may be brought only in the judicial district where such lands are located or, if located in different districts in the same State, in any of such districts.

§ 1400. Patents and copyrights

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights may be instituted in the district in which the defendant or his agent resides or may be found.

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

§ 1401. Stockholder's derivative action

Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants.

§ 1402. United States as defendant

(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides.

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

§ 1403. Eminent domain

Proceedings to condemn real estate for the use of the United States or its departments or agencies shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts.

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

§ 1405. Creation or alteration of district or division

Actions or proceedings pending at the time of the creation of a new district or division or transfer of a county or territory from one division or district to another may be tried in the district or division as it existed at the institution of the action or proceedings, or in the district or division so created or to which the county or territory is so transferred as the parties shall agree or the court direct.

§ 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue. As amended May 24, 1949, c. 139, Sec. 81, 63 Stat. 101

37

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